2

No. 06-452

In The
Supreme Court of the United States

JOHN FENDRICK,

Petitioner,

v.

PPL SERVICES CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. OSSIP
MORGAN, LEWIS & BOCKIUS LLP
Counsel of Record for Respondent PPL Services Corp.
1701 Market Street
Philadelphia, Pennsylvania 19103
215.963.5761
215.963.5001 (facsimile)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF THE QUESTION PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Third Circuit's Opinion, which affirmed the district court's proper exercise of its discretion in excusing Juror No. 13, does not conflict with any decision of this Court or of any other Court of Appeals, and does not implicate any important unsettled federal question.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent, PPL Services Corp. is a non-governmental party to this litigation. The parent corporation of PPL Services Corp. is PPL Corporation. PPL Corporation is the only publicly held company that owns 10% or more of PPL Services Corp.'s stock.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
INTRODUCTION	2
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	5
A. Certiorari Should Be Denied Because There Is No Split Of Authority On The Issue Presented And No Important Federal Question Is At Stake	6
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Ballard v. United States, 329 U.S. 187 (1946) 10

Hopt v. People, 120 U.S. 430 (1887) 7

Kirk v. Raymark Industrial, Inc., 61 F.3d 147 (3d Cir. 1995) 7

New York v. Guzman, 478 N.Y.S.2d 455 (N.Y. Sup. Ct. 1984) 10

Reynolds v. United States, 98 U.S. 145 (1878) 8

Taylor v. Louisiana, 419 U.S. 522 (1975) 9

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) 7, 9

United States v. Calabrese, 942 F.2d 218 (3d Cir. 1991) 7

United States v. Candelaria-Silva, 166 F.3d 19 (1st Cir. 1999) 8

United States v. Dempsey, 830 F.2d 1084 (10th Cir. 1987) 8, 9

United States v. Ferri, 778 F.2d 985 (3d Cir. 1985) 7

United States v. Salamone, 800 F.2d 1216 (3d Cir. 1986) 6, 10

STATUTES

28 U.S.C. §1866 6

RULES

Sup. Ct. R. 10 ..... 2, 5

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, PPL Services Corp. respectfully requests that the Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered July 25, 2006 be denied. In support thereof, PPL Services Corp. represents as follows:

OPINIONS BELOW

The Third Circuit Court of Appeals Opinion, which was marked "Not Precedential" by that court, was published at 2006 WL 2053114. The opinion of the Third Circuit Court of Appeals is included in Appendix A to the Petition (A-3). The district court's March 8, 2005 Memorandum denying Plaintiff's Motion for a New Trial is unreported.

JURISDICTION

The Third Circuit entered its decision in favor of PPL Services Corp. on July 25, 2006. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Third Circuit Court of Appeals decision on a Writ of Certiorari.

INTRODUCTION

Petitioner has presented no "compelling reasons" to grant his Petition for Writ of Certiorari ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Third Circuit's July 25, 2006 Opinion ("Opinion") is in conflict with any decision of this Court or of any other Court of Appeals, or that the Third Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Therefore, the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Petitioner John Fendrick ("Petitioner" or "Fendrick") brought the underlying action against Respondent PPL Services Corp. ("PPL" or "Respondent") alleging various claims of discrimination, harassment and retaliation under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* ("ADA"), the Pennsylvania Human Relations Act, 43 P.S. §955 *et seq.* ("PHRA"), and the Family and Medical Leave Act, 29 U.S.C. §2601 *et seq.* ("FMLA").[1] During the voir dire, Juror No. 13 answered affirmatively when prospective jurors were asked if they had any physical disabilities that might interfere with their ability to serve as a juror. The district court then conducted individual voir dire on the record with Juror No. 13 and all others who responded affirmatively to this and other voir

[1] The district court granted summary judgment in favor of PPL on the harassment claims and the FMLA claim. Only the retaliation, failure to accommodate, and discrimination claims brought pursuant to the ADA and the PHRA went to trial.

dire questions. (A-28 to 33). The court first asked her whether moving her into the front row would "make any difference." *Id.* Juror No. 13 responded:

> I really don't. I had this problem. I was called to jury duty in Wilkes-Barre and I'd always wanted to serve on a jury and so I was all excited after the third time. And when people turn around, when they drop their voice, I lose it and I also have a ringing.[2]

(A-28). When asked if she wore a hearing aid, Juror No. 13 stated emphatically, "No. *I'm kind of stubborn about it.*" (A-28) (emphasis added).

After PPL moved to strike Juror No. 13 for cause, Petitioner's counsel requested that the court provide her "with a hearing," presumably referring to a hearing aid, (A-31), despite the fact that Juror No. 13 declined to use a hearing aid. (A-28). When Petitioner's counsel asked about

---

[2] Juror No. 13 exhibited the extent of her hearing impairment in speaking with the District Court. Despite being but three to four feet away from the Judge (A-32), Juror No. 13 failed to hear the Court's question:

> THE COURT: You answered – you also answered a question to the effect, affirmatively or yes to, have you or any member of your family ever [had] to stop work and/or go out on disability because of a health problem that kept them from working.
>
> THE JUROR: Oh, I'm sorry. See, I didn't hear the end of that.
>
> THE COURT: Okay.
>
> THE JUROR: And did you say kept working?
>
> THE COURT: That kept them from working.
>
> THE JUROR: Oh, kept them from working. . . .

(A-28-29).

whether the voices in the courtroom could be magnified, the court clerk explained that experiments had been done with a headphone system but because not everyone was supplied with a microphone and the system merely amplified the existing speaker system, the district court did not have great success in employing the system. (A-31). The district court judge noted that Juror No. 13 had difficulty hearing one of his own questions although she was very close to him, noted the "limited application" of the court's amplification system (A-32), and stated his belief that "it's important that counsel be permitted to try the case in the fashion that they see fit" and that he was "not going to require that counsel sit at counsel tables," and that "it's not appropriate for someone to sit if they're unable to hear everything." (A-33). The court checked again with his clerk as to whether "mobile microphones" were available, to which the Clerk stated "No, not to work through this particular system, no." *Id.* The court then granted PPL's request to strike Juror No. 13 for cause. *Id.*

At trial, the jury returned a verdict for PPL, finding that it did not discriminate or retaliate against Petitioner or fail to accommodate his disability. (A-13 to 16). Following the district court's denial of Petitioner's Motion for a New Trial,[3] Petitioner appealed to the United States Court of Appeals for the Third Circuit, which affirmed the jury verdict in favor of PPL and the denial of Petitioner's motion for a new trial. With respect to the district court's

[3] In Petitioner's motion before the district court, he asserted that he was entitled to a new trial because of the striking of Juror No. 13, errors in the court's mixed motives and failure to accommodate instructions and the verdict slip, and that the verdict was against the weight of the evidence. Of these issues, Petitioner only raises the excusing of Juror No. 13 in his Petition.

excusal of Juror No. 13, the court noted that "28 U.S.C. §1865(b)(4) authorizes a district judge to exclude a juror who 'is incapable, by reason of mental or physical infirmity, to render satisfactory jury service[,]'" and held that "it is proper for a district court to exclude a juror on account of the juror's disability under certain circumstances – that is, when the disability is of a sort that renders the juror unable to perform satisfactory jury service." (A-6). Finding that Petitioner's "assertion that the District Judge made no attempt to accommodate the juror's disability is refuted by the record, which shows that the District Judge evaluated the extent of the juror's impairment and made reasonable efforts to accommodate her[,]" noting that Juror No. 13 stated that she had never worn a hearing aid and that, in fact, she was "stubborn about it[,]" the Court of Appeals found "no abuse of discretion in the District Court's decision to exclude this juror." (A-6 to 7). This Petition followed.

REASONS FOR DENYING THE PETITION

Certiorari is granted only for compelling reasons, such as the existence of a conflict among federal courts on an important federal question. Sup. Ct. R. 10. Petitioner seeks certiorari on the issue of whether the district court abused its discretion in excusing a hearing impaired prospective juror for cause. PPL respectfully submits that certiorari is not warranted, as there is no split of authority among the courts of appeal on this issue, no conflicts with prior decisions of this Court, and no important or unsettled federal question. Contrary to Petitioner's assertion, neither the district court nor the Third Circuit condoned the *per se* exclusion of disabled jurors; this case involves

nothing other than the lower courts' careful and typical review of an individual prospective juror's ability to serve. This is an exercise that is carried out in hundreds of federal courthouses on a daily basis, applying well-settled principles to the individual facts and circumstances of each case. The Third Circuit reviewed in a comprehensive manner the record below and concluded that the district court did not abuse its discretion in dismissing Juror No. 13 for cause. This case simply does not present any "compelling reasons" for review by this Court.

A. Certiorari Should Be Denied Because There Is No Split Of Authority On The Issue Presented And No Important Federal Question Is At Stake.

District courts are empowered by federal law to determine an individual's qualifications for jury service. Specifically, 28 U.S.C. §1865(b)(4) provides that the district court "shall deem any person qualified to serve on grand and petit juries unless he . . . is incapable, by reason of mental or physical infirmity, to render satisfactory jury service[.]" *Id.* In addition, otherwise qualified jurors may be "excluded by the court on the ground that . . . his service as a juror would be likely to disrupt the proceedings, or . . . excluded . . . upon a challenge by any party for good cause shown[.]" 28 U.S.C. §§1866(c)(2), (4).

The main vehicle by which the district court is to evaluate prospective jurors' qualifications to serve is the voir dire process. *United States v. Salamone*, 800 F.2d 1216, 1223-24 (3d Cir. 1986) ("[t]his 'testing' by voir dire remains the preferred and effective means of determining a juror's impartiality" and competence). The rationale behind this method is two-fold: first, it provides a record of

the proceedings which can be reviewed by a higher court and, second, it requires the district court to view and analyze potential jurors as individuals. *Id.* ("'jury competence is an individual rather than a group or class matter.'") (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946)).

Furthermore, the Third Circuit Court of Appeals applies an "abuse of discretion" standard in reviewing a district court's decision to exclude a particular juror. *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 153 (3d Cir. 1995) (applying "abuse of discretion" standard to district court's decision to strike prospective jurors); *United States v. Calabrese*, 942 F.2d 218, 223 (3d Cir. 1991) (recognizing the "special deference" due a district court's determination regarding the competence of a particular juror); *United States v. Ferri*, 778 F.2d 985, 994 (3d Cir. 1985) (refusing to award new trial on ground that trial court refused to excuse allegedly partial juror for cause where trial court conducted ample voir dire; Third Circuit deferred to the judgment of the trial judge because "under our system it is that judge who is best situated to determine competency to serve impartially.").

There is no split among the circuit courts of appeal on the issue before this Court – the courts of appeal and this Court are in agreement that abuse of discretion is the appropriate standard to be applied in evaluating a trial court's decision to exclude or retain prospective jurors. *Thiel, supra*, 328 U.S. at 220 ("[t]he choice of the means by which unlawful distinctions and discriminations [in jury selection] are to be avoided rests largely in the sound discretion of the trial courts and their officers."); *Hopt v. People*, 120 U.S. 430, 434-35 (1887) ("the judgment of the court upon the competency of the juror in such cases

[where] ... it appeared to the court upon [the juror's] declaration, under oath or otherwise, that he could and would ... act impartially and fairly upon the matters submitted to him ... is *conclusive.*") (emphasis added); *Reynolds v. United States*, 98 U.S. 145, 156 (1878) ("[i]t is clear, therefore, that upon the trial of the issue [as to a prospective juror's partiality] raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality.... *The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest.*") (emphasis added); *United States v. Candelaria-Silva*, 166 F.3d 19, 30 (1st Cir. 1999) (district court did not abuse its discretion in excusing prospective juror who indicated he had a medical problem with his eye); *United States v. Dempsey*, 830 F.2d 1084 (10th Cir. 1987) (applying abuse of discretion standard to district court's decision to retain deaf juror where a sign language interpreter was an appropriate accommodation as the juror could actually read sign language).

Nonetheless, Petitioner attempts to fabricate such a rift by distorting the record to suggest that the district court summarily and systematically excluded Juror No. 13 solely because she has a hearing impairment. In doing so, Petitioner relies on the fact that a deaf juror was retained as a juror in *Dempsey* whereas Juror No. 13 was excused in this case. However, the fact that the Tenth Circuit in *Dempsey* affirmed a district court's decision to retain a deaf juror, who was capable of reading sign language, to serve with the aid of a sign language interpreter does not create a split with the Third Circuit Court of Appeals merely because it affirmed a district court that, after a

thorough evaluation of the prospective juror at issue, came to a different factual conclusion. *Compare Dempsey*, *supra*, 830 F.2d at 1086, *with* Opinion at A-3 to 12. In evaluating the district court's refusal to excuse a deaf juror merely because she was deaf, the *Dempsey* court applied an abuse of discretion standard, the very same standard applied by the Third Circuit in the instant case. Importantly, the Tenth Circuit stated that the juror's

> ability to perceive and weigh the evidence is best evaluated by the trial judge. [The juror] was both literate and articulate; her ability to speak and read lips mitigated the effects of her hearing loss. . . . We hold that the trial judge did not abuse her discretion in allowing [the juror], with the aid of an interpreter, to consider evidence presented at trial.

Dempsey, *supra*, 830 F.2d 1088-89.

Petitioner presents nothing to suggest that the Third Circuit's analysis of the district court's exercise of discretion with regard to Juror No. 13 applied a standard different from that applied by the Tenth Circuit or came close to implicating an issue that needs resolution by this Court.

The remainder of the cases relied upon by Petitioner are equally inapplicable in that they each involve decisions to strike potential jurors, not based on an individual analysis of their suitability for jury service, as occurred here, but based solely upon the potential jurors' inclusion in or identification with a certain group or class. *See Taylor v. Louisiana*, 419 U.S. 522, 533 (1975) ("women cannot be systematically excluded from jury panels from which petit juries are drawn."); *Thiel*, *supra*, 328 U.S. at 220 ("prospective jurors shall be selected by court officials

without systemic and intentional exclusion of any ... economic, social, religious, racial, political [or] geographical ... groups[; j]ury competence is *an individual* rather than a group or class matter.") (emphasis added); *Ballard v. United States*, 329 U.S. 187, 193 (1946) (same); *Salamone*, *supra*, 800 F.2d at 1224 (finding error in systematically and arbitrarily excluding all NRA-related jurors from panel, without further inquiry of the individual jurors, in firearms case); *New York v. Guzman*, 478 N.Y.S.2d 455, 459-60 (N.Y. Sup. Ct. 1984) (the "blunt constraint that no deaf person can be qualified to sit on a jury is a passe conclusion which defies and has no connection to reality or common sense[;]" deaf persons "are not all the same" and "[t]hus, with respect to a disability, the court must determine whether the scope of a disabled person's impairment would preclude him from serving as a reasonable juror or would adversely affect the rights of the litigants.").

PPL's motion to strike Juror No. 13 for cause and the district court's decision to grant that request were not based upon the mere fact that the potential juror had a disability; they were based on a careful assessment of the potential juror's ability to serve in this case. Thus, the district court questioned Juror No. 13 in such a manner as to determine the extent of her hearing impairment and undertook inquiries as to the court's ability to accommodate her. (A-28 to 33). In doing so, the district court considered at least three different types of accommodations – moving the juror to the front row, utilizing an amplification system, and utilizing mobile microphones – and determined that they would not provide an effective accommodation.

Further, the district court personally observed the extent of Juror No. 13's hearing impairment when, from

three to four feet away, he had to repeat himself because Juror No. 13 could not hear all of what he said. (A-28-29, 32). Neither at trial nor before the Third Circuit Court of Appeals did Petitioner identify any effective accommodation that would have permitted Juror No. 13 to serve effectively.[4]

It is a gross distortion of the record for Plaintiff to assert that "[t]he trial court never took the time to see how it could accommodate the hearing impaired juror. Instead, the trial court got rid of its problem the quickest way possible – by excluding the disabled from jury service." (Petition, at 16). To the contrary, the record clearly establishes that the district court carefully questioned Juror No. 13 to identify the extent of her hearing impairment and its probable effect on her ability to effectively serve as a juror, and assessed the availability of any accommodating equipment. Likewise, the Third Circuit applied the correct abuse of discretion standard in reviewing the district court's decision.

---

[4] In yet another example of Petitioner's failure to establish that an *appropriate* accommodation was available for Juror No. 13, Petitioner failed to establish that Juror No. 13 was even capable of reading sign language or that a sign language interpreter would have been an appropriate accommodation. Furthermore, while Petitioner now suggests that Juror No. 13 could "easily" have been accommodated via an "infrared assistive listening device system that was available to the court" (Petition, at 8), he failed to make such a request in the district court.

CONCLUSION

Petitioner has failed to establish any compelling reasons for this Court to grant the Petition. Therefore, PPL Services Corp. respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL J. OSSIP, ESQUIRE
MORGAN, LEWIS & BOCKIUS LLP
Counsel of Record for Respondent PPL Services Corp.
1701 Market Street
Philadelphia, Pennsylvania 19103
215.963.5761
215.963.5001 (facsimile)